No. 94-859

In The

Supreme Court of the United States

October Term, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, et al.,

Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE STATE WATER CONTRACTORS, ASSOCIATION OF CALIFORNIA WATER AGENCIES AND CENTRAL VALLEY PROJECT WATER ASSOCIATION AS AMICUS CURIAE, URGING AFFIRMANCE

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INTEREST OF AMICI

The State of California is highly dependent upon the projects which convey water to its urban areas and its farms. Roughly 75% of California's water resources are found north of the City of Sacramento, while approximately 75% of the urban and agricultural water demand within California occurs south of the City of Sacramento. To deal with this geographical imbalance of supply and demand, both the State and the Federal governments

have constructed interdependent water projects whose purposes include the transfer of water from where it is found to where it is consumptively used. Together, these projects provide water to more than two-thirds of California's urban population and the vast majority of its farmland.

Amicus, State Water Contractors ("Contractors") is a non-profit incorporated association comprised of 27 public agencies formed under the laws of the State of California. Each of the agencies holds a contract with the State of California to receive water from California's State Water Resources Development System or "State Water Project." By means of these contracts, the State Water Project provides some 20 million urban residents and nearly a million acres of farmland in California with all, or a portion, of their water supply.

Amicus, Central Valley Project Water Association ("CVPWA") is a non-profit, incorporated association comprised of 80 public agencies formed under the laws of the State of California. Each of the agencies holds a contract with the United States to receive water from the federal Central Valley Project. By means of these contracts the Central Valley Project provides some 4 million households and 3 million acres of farmland with all, or a portion, of their water supply.

Amicus, Association of California Water Agencies ("ACWA") is a non-profit incorporated association consisting of some 419 public agencies who are urban and agricultural water purveyors and flood control agencies formed under State law. Many of the members of ACWA receive their water supply directly, or indirectly, from the

State Water Project or from the federally constructed Central Valley Project. The water deliveries provided by ACWA's members account for over 90% of the water consumed by urban and agricultural water users in the State of California.

The State Water Project ("SWP") and federal Central Valley Project ("CVP") both function, in significant part, by storing water and spring runoff in reservoirs located along the Sacramento River or its tributaries, upstream of the Sacramento-San Joaquin Delta ("Delta"). When the stored water is needed to meet the consumptive demands of urban or agricultural users or the water quality or flow requirements of instream species, it is released from these reservoirs to flow downstream to the Delta – a roughly triangular maze of meandering channels and agricultural islands located approximately 90 miles east of the Golden Gate Bridge.

When it enters the Delta from the north, the previously stored water is capable of flowing in two directions. If it flows to the southerly reaches of the Delta, it can be lifted by SWP and CVP pumps into canals which serve urban users in the San Francisco Bay area and urban and agricultural users in the San Joaquin Valley and Southern California. If it is not pumped by the two projects or consumptively used by farmers in the Delta itself, the released water will flow westerly toward the Golden Gate Bridge; thence to the Pacific Ocean.

In a practical sense, the Delta thus forms the hub of California's water supply system, with water flowing in from upstream impoundments to be distributed from the Delta to both consumptive users and instream species.

Historically, the balance between distribution for consumptive use by SWP and CVP users, on the one hand, and allocation to instream needs, on the other, was determined by the provisions of water rights permits issued by the State of California. (*See, e.g. California v. United States*, 438 U.S. 645 (1978) and California Water Code Sections 1243, 1243.5 and 1257.5) More recently, however, the operations of the SWP and CVP, and thus the balance between consumptive and instream water use in the Delta, have been dictated by the United States Fish and Wildlife Service ("USFWS") and National Marine Fisheries Service ("NMFS").

This fundamental shift in regulatory authority results from the fact that the Delta, in addition to serving as the hub of California's principal water projects, also provides habitat for two aquatic species listed under the Endangered Species Act ("ESA"). (16 U.S.C. §§ 1531 *et seq.*) The winter run chinook salmon, an anadromous species listed as endangered, uses the Delta as part of its migration corridor to and from the Pacific Ocean. The delta smelt, listed as a threatened species, is largely resident within the Delta year round.

Based upon their conclusions regarding the habitat requirements of the winter-run salmon and delta smelt, and the effects of the operations of the SWP, the USFWS and NMFS have designated critical habitat (59 Fed. Reg. 65256) pursuant to Section 4 of the ESA (16 U.S.C. § 1533) and issued biological opinions pursuant to Section 7 of the ESA (16 U.S.C. § 1536) which radically alter the operational standards and procedures of the CVP and SWP to the detriment of those, such as *amici*, who are reliant upon project water supplies. (*See e.g. Westlands*

Water Dist. v. U.S. Dept. of Interior (E.D. Cal. 1994) 850 F.Supp. 1388, 1421). Importantly, the federal fishery agencies have made these changes without any substantial consideration of the economic impacts of doing so. Using the artificial definition of "harm" found in their regulations,[1] but not in the ESA itself, both the USFWS and NMFS have managed to avoid any substantial evaluation of the economic impact of their Delta-related ESA activities upon California's urban and agricultural water users – even in those instances where Congress has expressly directed that such an evaluation take place.

In Section 4 of the ESA, Congress specifically directed the Secretary of the Interior and the Secretary of Commerce to designate "critical habitat" for threatened and endangered species only *after* making an evaluation of the economic impact of doing so:

> "The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available *and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.* The Secretary may exclude any area from critical habitat *if he determines that the*

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[1] The regulations adopted by the USFWS and NMFS provide, in relevant part:

> "*Harm* in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." (50 CFR § 17.3)

> *benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat. . . . "* (16 U.S.C. § 1533(b)(2); emphasis added)

By equating "harm" with "habitat modification" for the purpose of determining whether a prohibited "take" has occurred within the meaning of Section 9 of the ESA,[2] the USFWS and NMFS have managed to avoid any substantial compliance with the foregoing statutory obligation. Thus, for example, in the course of recently designating the entire Sacramento-San Joaquin Delta as "critical habitat" for the delta smelt, the USFWS stated the following under the heading "Consideration of Economic and Other Factors":

> "Section 9 of the Act and Service regulations prohibit the taking of delta smelt without express authorization from the Service. *Under Service regulations, 'take' may include significant habitat modification or degradation that actually kills or injures protected species.* In addition, Federal agencies must consult with the Service to ensure that their actions are not likely to jeopardize the continued existence of the listed species. An action could jeopardize the existence of a listed species if it destroys or modifies its habitat. This is so regardless of whether the

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[2] Section 9 of the Endangered Species Act (16 U.S.C. § 1538) provides in relevant part:

> " . . . with respect to any endangered species of fish or wildlife listed pursuant to Section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to:
>
> (C) take any such species within the United States or the territorial sea of the United States."

> habitat has been designated as critical habitat. *Therefore, the direct economic and other impacts resulting from designation of critical habitat are relatively small because the Act provides substantial protection to habitat through listing of the species itself."* (65 Fed. Reg. 65262, emphasis added)[3]

Thus, although Congress added an economic analysis obligation to the ESA with the expectation that the full cost of the actions of the USFWS and NMFS would be considered,[4] the agencies have managed to defeat Congress' purpose by means of the administrative regulation at issue in this case. Rather than analyze the "economic impact" of their actions as Congress intended, the agencies, instead, engage in segmented, minimalist analyses which assign the bulk of the economic impact of their ESA activities to the listing process.[5] This is accomplished

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[3] In 1992, NMFS used the identical rationale to avoid any meaningful analysis of the economic impact of designating critical habitat for the winter-run salmon. (57 Fed. Reg. 36626, 36630)

[4] In 1982, when Congress reauthorized and amended the ESA (P.L. 97-304) the House Report which accompanied the amendments stated the following:

> "Desirous to restrict the Secretary's decision on species listing to biology alone, the [Merchant Marine and Fisheries] Committee nonetheless recognized that *the critical habitat designation, with its attendant economic analysis, offers some counter-point to the listing of species without due consideration for the effects on land use and other development interests."* (ESA Amendments of 1982, H.R. 567, *reprinted* in 1982 U.S. Code Cong. & Admin. News 2807, 2812 (Merchant Marine and Fisheries Committee).)

[5] The agencies have not limited their avoidance of the economic analysis obligation imposed by Congress to aquatic

by means of the regulation which equates "harm" with "habitat modification," making such modification independently controllable through the "take" provisions of the ESA simply as a result of listing a species. The act of designating critical habitat – including its associated requirement of disclosing the economic cost of ESA regulation – is thus marginalized.

The results of this bureaucratic maneuvering are predictable. While the actions of NMFS and the USFWS have resulted in the loss of hundreds of thousands of acre-feet of water to the two-thirds of California's urban and agricultural economy dependent upon SWP and CVP exports from the Delta (*see e.g.* 59 Fed. Reg. 65263) an evaluation of the *economic impact* of such loss has never occurred. Instead, after allocating the bulk of the economic impact to the *listing* of the delta smelt (based upon its own regulation) the USFWS has concluded that the economic impact of its critical habitat designation is limited to "sand and gravel operations" and agricultural activities within the Delta itself. (59 Fed. Reg. 65262) As a consequence, the *substantial* economic impact visited upon the Californians, such as *amici* and the more than 25 million Californians they serve, who are dependent upon CVP

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species which utilize the Delta. Instead, they have apparently developed a pattern and practice of utilizing the definition of "harm" concocted in 50 C.F.R. 17.3 to avoid any meaningful analysis of the economic impact of designating critical habitat of *any* species, including terrestrial species. (*See, e.g.*, 57 Fed. Reg. 34892, 34896, segmenting the analysis of economic impact of designating critical habitat for the least Bell's vireo.)

and SWP Delta exports in their homes, their businesses and on their farms, has been completely ignored.

SUMMARY OF ARGUMENT

In the course of developing a regulatory regime for the protection of threatened and endangered species, Congress dealt explicitly with the protection of habitat. It required the designation of critical habitat for listed species and established a well-defined mechanism for such designation which incorporates the requirement of an analysis of the economic impact of species protection.

The administrative definition of the word "harm," adopted by the Secretary to include "habitat modification," renders meaningless the critical habitat designation process established by Congress. Pursuant to the definition, *all* of the habitat utilized by a species is automatically protected immediately upon listing, thus making the designation of critical habitat pointless. The same administrative definition is also being used by the USFWS and NMFS to avoid Congress' directive to balance the economic impact of species protection as part of the process of critical habitat designation. Because the agencies have defined "harm" to include "habitat modification," they uniformly find that the major economic impact of species protection occurs at the time of listing. They thus piecemeal the economic impact analysis required by Congress and, by loading the bulk of the impact upon the listing determination (which includes no economic impact requirement), uniformly conclude that

the economic impact of designating critical habitat is negligible.

The legislative history of the Endangered Species Act fails to support this administrative misinterpretation and avoidance. When Congress amended the ESA in 1978, it considered proposed legislation which would have defined the "take" of species to include the modification of their habitat. It elected, instead, to exclude habitat modification from the definition of "take," notwithstanding testimony from several sources that habitat modification should be included.

Instead, Congress chose to deal with habitat protection in other ways. In Section 4 of the Act, it required the Secretary to designate critical habitat. In Section 7, it directed the Secretary to protect such designated habitat by proposing "reasonable and prudent alternatives" to federal activities which threaten to adversely modify such habitat. In Section 5 of the Act, Congress empowered the Secretary to purchase habitat by exercising powers granted under the Fish and Wildlife Coordination Act and other federal legislation, for that purpose. Finally, Congress directed the Secretary to develop recovery plans for listed species which are required to incorporate elements described with such breadth that they may encompass a variety of habitat restoration and protective measures.

What Congress did *not* do – and what the Secretary, consequently, may not do himself by regulation – is define "harm," for purposes of determining the "take" of listed species, to include the modification of their habitat. Because the Secretary has thus attempted to do what

Congress elected not to do; indeed, because he is attempting to use his own administrative definition to defeat the economic balancing obligation imposed by Congress, the Secretary's action is *ultra vires* the authority granted by the Endangered Species Act. It should therefore be rejected as arbitrary and capricious within the meaning of the Administrative Procedure Act.

ARGUMENT

I. INTERPRETING "HARM" TO INCLUDE "HABITAT MODIFICATION" RENDERS THE DESIGNATION OF CRITICAL HABITAT MEANINGLESS

Section 4 of the Endangered Species Act (16 U.S.C. § 1533) requires the Secretary of Interior, in conjunction with the listing of a species, to designate critical habitat:

> "(A) [The Secretary] shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat;. . . . "[6]

By defining harm to include habitat modification, the Secretary renders meaningless the above-quoted requirement of critical habitat designation. If the prohibition

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[6] As explained, *infra*, Section 7 of the ESA (16 U.S.C. § 1536) obligates the Secretary to review the actions of other federal agencies to ensure that they do not result, *inter alia*, in the destruction or modification of critical habitat. (16 U.S.C. § 1536(a)(2)) The Secretary's designation of critical habitat is, thus, an important habitat protection mechanism under the terms of the ESA.

against "harm" also prohibits modification of the habitat of any listed species, there is no reason for the Secretary to designate critical habitat. Instead, *all* of the habitat of *every* listed species would already be protected. It is evident from the provisions of Section 4 of the ESA, however, that this was not Congress' intention.

In Section 4 of the Act, Congress made the consideration of economic impacts an integral part of the designation of critical habitat for every listed species. It provided:

> "The Secretary shall designate critical habitat . . . after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." (16 U.S.C. § 1533(b)(2))[7]

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[7] The legislative history of the economic analysis provision is instructive on this issue. As originally enacted, Section 4 of the ESA (16 U.S.C. § 1533) did not require consideration of the economic impacts associated with the designation of critical habitat. Congress changed that in 1978 by adding a new paragraph to Section 4(b) which incorporated essentially the same economic analysis language which appears in the current version of the ESA.

The amendment which added the economic analysis requirement arose out of H.R. 14104 of the 95th Congress. The bill was introduced on September 18, 1978 by Representative Leggett of California. According to its accompanying House Report, H.R. 14104 represented a compromise between disparate points of view: the bill attempted to retain the basic integrity of the ESA while introducing some flexibility which would permit exemptions from the Act's requirements. (H.R. 95-1625, *reprinted in* 1978 U.S. Code Cong. Admin. News 9453, 9463-4)

Based upon this consideration of economic impacts, Congress then directed the Secretary to conduct a weighing and balancing process from which the final designation of critical habitat would emerge:

> "The Secretary may exclude any particular area as critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." (16 U.S.C. § 1533(b)(2))[8]

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[8] On October 14, 1978, during the debates in the House leading to adoption of the bill, Representative Leggett, the author of H.R. 14104, which added the economic balancing requirement to Section 4 of the ESA, described the purpose of the requirement:

> "The Endangered Species Act has been criticized because it allows for no consideration of the economic impact of listing a species or designating critical habitat. Although H.R. 14104 retains the Act's stringent mandate, it does introduce a consideration of economic impact in several respects. First, the consideration of economics is central to the exemption process. . . . Second, the Bill includes a provision which requires the Secretary to evaluate the economic impact of designating critical habitat for invertebrate species. This provision authorizes the Secretary to alter the designation of critical habitat for the species if he determines that the benefits associated with excluding the habitat outweighs the benefits associated with the designation. . . . " (Remarks of Representative Leggett, 124 Cong.Rec. 38134 (1978))

Considering the nature of the weighing and balancing process directed by Congress, the manner in which the Secretary conducts his required economic analysis takes on obvious significance. The greater the anticipated economic impact, the more likely it is that critical habitat will be reduced, and vice versa.

If habitat is *already* protected simply through the listing of a species, however, then there is little or no significance to the economic balancing obligation which Congress described in detail in Section 4. Instead, the entirety of the habitat utilized by a listed species would *already* be protected – regardless of the resulting economic impact – simply by Congress' choice of the word "harm," in Section 3(19) of the Act (16 U.S.C. § 1532(19)) to define the meaning of "take."

The results of this skewed administrative interpretation of the word "harm" are amply demonstrated by the rule finally adopted by the USFWS to designate habitat for the delta smelt in California. (59 Fed. Reg. 65256) Rather than evaluating the actual economic impact of protecting the habitat of the delta smelt, the rule segments the economic analysis and considers only the *incremental* impact resulting from the critical habitat designation. It thus provides:

> " . . . [t]he impacts of designating critical habitat are in addition to the economic and other impacts attributable to (1) listing of the species, (2) economic effects resulting from conservation actions taken by other Federal agencies under section 7(a)(1) of the Act, and (3) regulatory actions required by other laws." (59 Fed. Reg. at 65262)

By erecting this artificial construct, nowhere described in the ESA, the rule thus reaches the remarkable conclusion that designation of the entire Sacramento-San Joaquin Delta as critical habitat, including the pumping plants of the CVP and SWP used to supply water to two-thirds of California's entire urban and agricultural population, will result in only a minimal economic impact. (*Id.*) So concluding, USFWS excludes no area, whatsoever, from its earlier proposed critical habitat designation. (59 Fed. Reg. at 65264)

The USFWS's use of the device of an *incremental* economic impact analysis – possible only if "harm" is defined to include "habitat modification" – thus effectively eliminates the restraints imposed through the economic balancing process created by Congress in Section 4 of the ESA. As illustrated by the example of the delta smelt, the resulting "analysis" conducted by the Secretary is nothing more than a charade.

II. THE LEGISLATIVE HISTORY OF THE ESA DEMONSTRATES THAT "HARM" DOES NOT INCLUDE "HABITAT MODIFICATION"

Congress defined the word "take" as used in Section 9 of the Endangered Species Act to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." (ESA § 3(19), 16 U.S.C. § 1532(19) (1988))

This definition is significantly different from the proposed definition found in S. 1983, the original ESA bill referred to the Senate Committee on Commerce, which

defined the "take" of wildlife to include " . . . the destruction, modification, or curtailment of its habitat or range." (S. 1983, 93d Cong., 1st Sess., § 3(6)(A) (1973); *see A Legislative History of the Endangered Species Act of 1973, As Amended, of 1976, 1977, 1978, 1979 and 1980,* prepared by the Congressional Research Service for the Senate Committee on Environment and Public Works 1982 (hereinafter "Legislative History"), p. 228)

The above-quoted reference to habitat modification originally appearing in S. 1983 was subsequently deleted in favor of a definition of "take" which *excludes* any reference to habitat. (Legislative History, p. 343) While the legislative history does not indicate why Congress chose the existing definition of "take," the rejection of the "habitat modification" language appearing in an earlier version of the bill ultimately adopted by the Senate should not be interpreted as an oversight.

In the course of interpreting Congress' purpose in drafting the Endangered Species Act, this Court has attributed considerable significance to other deletions of language from earlier versions of S. 1983. In *TVA v. Hill,* 437 U.S. 153 (1978), for example, the Court elaborated its discussion of the expansive scope of Section 7 of the ESA with the following reference to deletions made to S. 1983:

> "What is very significant in this sequence is that the final version of the 1973 Act carefully omitted all of the reservations described above. In the bill which the Senate initially approved (S. 1983), however, the version of the current [Section] 7 merely required federal agencies to 'carry out such programs *as are practicable* for the protection of species listed. . . . ' S. 1983, § 7(a).

> (Emphasis in original) By way of contrast, the bill that originally passed the House, H.R. 37, contained a provision which was essentially a mirror image of the subsequently passed § 7 – indeed all phrases which might have qualified an agency's responsibilities had been omitted from the bill." (*Id.* at 182, emphasis in original, footnote deleted)

In describing the foregoing legislative changes, the Court acknowledged that the legislative history contained no "specific reference to [the] choice of provisions," but relied upon congressional statements to determine its meaning. (*Id.* at 183) Here, a similar examination of the record leads unmistakably to the conclusion that Congress knowingly excluded "habitat modification" from the definition of "take" when it adopted the definition of the term which now appears in the Act.

At the same time that S. 1983 was working its way through the Senate, the Senate Subcommittee on the Environment was considering S. 1592, another endangered species bill which defined "take" *without* including language relating to habitat modification. (S. 1592, 93rd Cong., 1st Sess. (1973)) Several witnesses testifying in hearings conducted by the Subcommittee on S. 1592 criticized the bill for precisely that reason. For example, Dr. John W. Grandy, Administrative Assistant for the Wildlife, National Parks and Conservation Association, testified that:

> "The definition of 'take,' in the case of animals, should include 'threatened destruction, modification, or curtailment of habitat.' In my opinion, adequate habitat is the key to survival of

> most endangered species. Coupled with that should be the ability for the Secretary to prohibit 'taking.' " (*The Endangered Species Act of 1973: Hearings Before the Senate Subcommittee on the Environment on S. 1592 and S. 1983*, 93rd Cong., 1st Sess. 108 (1973))

Similarly, Mr. John S. Gottschalk, Executive Vice-President of the International Association of Game, Fish, and Conservation Commissioners, testified:

> "[The] legislation should incorporate the well-established fact that while legal protection and law enforcement are needed, maintenance of critical habitat is vital to the restoration of endangered species. Because taking native species is not the reason for their decline the prohibition on taking contained in section 4 can be expected to be of little utility. . . . Accordingly, federal legislation should come to grips more forcefully with the critical issue of habitat. To this end we urge a more specific directive designed to stem the disappearance of critical habitat." (*Id.*)

The debate in the Senate also discussed habitat loss as an important cause of the decline of various species. The result, however, was a proposal for land acquisition, not a proposal to include habitat modification within the meaning of "take." Senator Tunney, the floor manager of the Endangered Species Act legislation in the Senate in 1973, for example, expressed his recognition of the need to protect habitat. In doing so, however, he also recognized that such protection was provided through the "acquisition" of habitat, not the prohibition of "take":

> "Many species have been inadvertently exterminated by a negligent destruction of their habitat.

> Their habitats have been cut in size, polluted, or otherwise altered so that they are unsuitable environments for natural populations of fish and wildlife. Under this bill, we can take steps to make amends for our negligent encroachment. The Secretary would be empowered to use land acquisition authority granted to him in certain existing legislation to acquire land for the use of the endangered species programs. . . . *Through these land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction.*" (Legislative History, p. 358, emphasis added)

Thus, even the proponents of the Endangered Species Act viewed land acquisition as the primary means to avoid habitat loss on private lands, never suggesting that such loss could be prevented through the "take" provisions of Section 9 of the Act. Indeed, the statement of Senator Gaylord Nelson, a strong proponent of protecting threatened and endangered species, underscores the point that habitat modification was not to be included in the definition of "take," but rather would be dealt with through acquisition:

> "Because of this act, an animal or fish species will not be overtly 'taken, . . . ' [¶] Yet, it is common knowledge that there is another danger to our wildlife, a threat which is unavoidable: the expansion of our cities and industries. . . . *This act acknowledges that habitat modification is liable to be increasingly prevalent as the cause of future wildlife losses. The Secretaries of Interior and Commerce are authorized to acquire the lands upon which the endangered and threatened species reside and funds are provided for this purpose.* Habitat acquisition will provide a framework, a base for

> the construction of true sanctuaries, preserves free from harmful human intrusions." (Legislative History, p. 403, emphasis added)

The legislative history in the House of Representatives is consistent with the above statements. The Report of the Committee on Merchant Marine and Fisheries, for example, stated:

> "Man can threaten the existence of species of plants and animals in any of a number of ways, by excessive use, by unrestricted trade, by pollution or by other destruction of their habitat or range. The most significant of those has proven also to be the most difficult to control: the destruction of critical habitat."
>
> "Clearly it is beyond our capability to acquire all the habitat which is important to those species of plants and animals which are endangered today, without at the same time dismantling our civilization. On the other hand, there are certain areas which are critical which can and should be set aside." (Legislative History, p. 144)

Nowhere does the legislative history support the argument that a species' habitat could be protected merely through the listing process. Instead, the consistent emphasis in Congress was on habitat designation or acquisition as the means of protection.

III. OTHER PROVISIONS OF THE ENDANGERED SPECIES ACT PROVIDE AMPLE AUTHORITY TO PROTECT HABITAT, THUS RENDERING THE SECRETARY'S DEFINITION OF "HARM" UNNECESSARY

The Endangered Species Act includes several procedures which give the Secretary of the Interior ample authority to protect the habitat of listed species. This authority makes it unnecessary for the Secretary to venture beyond the language of the ESA by defining "harm" to include "habitat modification."

As noted by those who spoke to the issue during debate on the Act, a primary method of habitat protection authorized by the ESA is the straightforward *purchase* of habitat utilized by listed species. Thus, Section 5(a) of the Act (16 U.S.C. § 1534(a)) requires the Secretary of the Interior to establish and implement a program to conserve endangered and threatened species. To enable the Secretary to do so, Congress granted the Secretary broad authority to:

> "(1) . . . utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, . . . the Fish and Wildlife Coordination Act, . . . and the Migratory Bird Conservation Act [citation omitted], as appropriate; and
>
> "(2) . . . acquire by purchase, donation, or otherwise, lands, waters, or interests therein, and such authority shall be in addition to any other land acquisition authority vested in him." (16 U.S.C. § 1534(a)(1) and (2))

The ESA also grants the Secretary the power to protect habitat by reviewing the actions of other federal

agencies to ensure that those actions do not result, *inter alia*, in the destruction or adverse modification of critical habitat. To this end, Section 7(a)(2) of the Act (16 U.S.C. § 1536(a)(2)), provides:

> "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species *or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, ...* " (Emphasis added)

In the event consultation between the action agency and the Secretary demonstrates that adverse modification of habitat *will* result from a project as proposed, Congress required the Secretary to suggest "reasonable and prudent alternatives" to the project which, in the Secretary's belief, would not generate adverse habitat modification or destruction. (16 U.S.C. § 1536(b)(3)(A))[9]

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[9] As is the case with the designation of critical habitat, the development of "reasonable and prudent alternatives" includes a significant element of economic balancing. Thus, Senator Howard Baker, an author of the amendments which added the "reasonable and prudent alternatives" language to the ESA in 1978, noted the view of the Senate Environment and Public Works Committee that the "reasonable and prudent" concept required not only an examination of engineering "feasibility," but also an examination of "community impacts, economic feasibility, and other relevant factors." (Legislative History, p. 1148)

Finally, Section 4 of the Act (16 U.S.C. § 1533(f)) requires the development and implementation of recovery plans for the conservation and survival of threatened and endangered species. In the course of detailing the contents of such plans, Congress wrote in terms sufficiently broad to encompass a variety of actions that would deal with habitat modification. Thus, Congress required the Secretary, "to the maximum extent feasible," to incorporate the following in recovery plans developed under the Act:

> "a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species; . . . . " (16 U.S.C. § 1533(f)(1)(B))

In sum, the provisions of Sections 4, 5 and 7 of the Endangered Species Act grant the Secretary broad authority to protect habitat. Such protection can be provided by the purchase of property, the development of reasonable and prudent alternatives to a proposed project which would otherwise adversely modify habitat, and the development of recovery plans which contain "site-specific management actions." Taken together these provisions provide ample authority to protect the habitat of any listed species, without resort to the *ultra vires* definition of "harm" employed by the USFWS.

By attempting to prohibit habitat modification by means of an over-inclusive administrative definition of "harm," rather than through the development of "reasonable and prudent alternatives," the USFWS, again, is attempting to avoid the balancing of economic impacts, which Congress intended it to undertake.

CONCLUSION

For all of the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

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Respectfully submitted,

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